
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: November 21, 1991
CASE NO. 89-ERA-39

IN THE MATTER OF

RAMESH JAIN,
COMPLAINANT,

v.

SACRAMENTO MUNICIPAL UTILITY
DISTRICT,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review are the [Recommended][1] Decision and Order (R.D. and O.) and Order Amending Decision of the Administrative Law Judge (ALJ), issued in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ addressed and rejected Respondent's procedural arguments in support of a motion to dismiss. The ALJ then considered the merits of the complaint and denied relief, concluding that Complainant failed to establish that alleged adverse actions were motivated by an intent to retaliate for protected activity. Before me Respondent submitted a letter in support of the ALJ's recommended decision, and Complainant, proceeding *pro se*, submitted a brief in opposition, with exhibits from the record attached. Respondent also moved to strike Complainant's brief.

BACKGROUND AND FACTS

On review I find that the record supports the ALJ's factual findings. Complainant began working for Respondent (SMUD) as a nuclear engineer in May 1984, and Complainant's annual performance appraisals prior to December 1987 were favorable. On

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December 24, 1987, Complainant received a memorandum from his supervisor, Mr. McAndrew, enumerating management concerns about Complainant's performance as an associate nuclear engineer, and instituting bi-monthly performance appraisals for a three month period to assist Complainant in improving his performance. RX-C. The memorandum explained that if Complainant's performance did not improve, progressive disciplinary action would be initiated beginning with a suspension and potentially leading to termination. Complainant received assignments and bi-monthly evaluations from Mr. McAndrew during January, February and March of 1988, as contemplated in the memorandum. RX-D; RX-E; RX-F; RX-G; RX-K. Mr. McAndrew testified, and the evidence confirms, that Complainant's work assignments initially were simpler and shorter, and that they became progressively more complex and long-term over the following six-month period and the remainder of 1988. Tr. at 144-147; 175-177.

On July 1, 1988, Complainant received written notice of a three day suspension, based on unsatisfactory work performance since the December 24 memorandum. RX-K. The suspension letter detailed Complainant's failure to complete two important assignments timely in April and May and his unsatisfactory performance on another April assignment. Mr. McAndrew stated in the notice that Complainant could handle only the shorter assignments in a timely and professional manner and that this was unacceptable at his classification level.

Complainant appealed the suspension to the SMUD general manager on July 5, 1988, RX-L, and July 21, 1988, RX-M, and in the course of the appeal process, the suspension was reviewed by several SMUD managers and found justified. The final step of Complainant's internal appeal was a SMUD committee hearing, held March 16, 1989. At the committee hearing the attorneys for SMUD and Complainant agreed that a settlement would be drafted by Complainant's attorney and would include the following terms: (1) that the December memorandum, the bi-monthly performance evaluations and the suspension letter would be placed in a sealed envelope for two years, and permanently removed from Complainant's personnel file if his performance problems did not recur; (2) Respondent would make all reasonable efforts to reassign Complainant to another supervisor; (3) Respondent would attempt to aid Complainant in the resolution of performance related problems and in improving his communication skills. RX-R.[2]

On January 9, 1989, while the appeal of his July 1988 suspension was in progress, Complainant drafted a letter to a

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member of the SMUD board of directors, CX-3, complaining about his treatment by his supervisor; expressing concerns about management; and alleging problems with the work and violations of Nuclear Regulatory Commission (NRC) regulations. Complainant attached a copy of his July 21, 1988, letter to the SMUD general manager grieving his suspension and alleging that his supervisor was harassing and intimidating him in order to suppress Complainant's expressions of concern about his supervisor's ability and the technical quality of the work being done. Complainant sent a copy of this January 9 letter to the NRC.

Complainant's annual performance appraisal for 1988 was prepared by Mr. McAndrew on February 7, 1989, and received by Complainant on April 19, 1989. The performance appraisal rating was unfavorable, *i.e.*, Complainant received an overall rating of 1.8 out of 5.0, with 1.0 being the lowest possible rating. *See* RX-S. In a complaint filed May 10, 1989, with the Wage and Hour Division of the United States Department of Labor, Complainant alleges that the unfavorable appraisal was "falsified" in retaliation for his January 9, 1989, letter because Complainant expressed his concerns about faulty work and violations of the regulations to the NRC.

COMPLAINT AND PROCEDURAL ISSUES

The May 10 complaint specifically challenged the unfavorable annual performance appraisal Complainant received on April 19, 1989, and attached copies of the appraisal, the January 9, 1989, letter and the July 21, 1988, letter. Complainant also alleged continued long term harassment and intimidation and concerns of possible termination in the future.

At the hearing, a document dated July 27, 1989, and entitled "Complainant's Statement," was admitted into the record as CX-1. Complainant prepared this statement for the hearing and testified that it was the background and summary of his complaint. Tr. at 4-7. The ALJ accepted the document as Complainant's opening argument since Complainant was proceeding *pro se*. *See* Tr. at 6, 9. In his R.D. and O., the ALJ addressed the unfavorable performance appraisal and each general allegation of retaliation by SMUD raised in Complainant's statement. *See* ALJ's R.D. and O. at 6-8. I agree with the ALJ's conclusions that all of Complainant's allegations were without merit, but before discussing the merits I will address Respondent's pending procedural motions.

Respondent, at the hearing, moved for dismissal of the complaint on two grounds: (1) Complainant failed to comply with the provision of 29 C.F.R. § 24.4(d)(2)(ii) that "[c]opies of any

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request for a hearing shall be sent by the complainant to the respondent....", thereby severely prejudicing Respondent; (2) Complainant failed to allege facts sufficient to constitute a basis for relief. I agree with the ALJ's handling of the notice issue and his

denial of dismissal on this basis. Respondent was notified of the request for a hearing, and any potential prejudice because of delay was precluded when the ALJ granted Respondent's request for a one-week continuance. I also agree with the ALJ's determination that in the complaint of May 10, Complainant sufficiently alleged facts, which if proven to be true, could constitute an act of discrimination in violation of the ERA. Tr. at 9-15.[3] Accordingly, the hearing on the merits of this complaint was appropriate.

Before me Respondent has moved to strike Complainant's Brief in opposition, claiming that it is "totally devoid of citation to the record, rendering it uncertain and unintelligible" and that Respondent is thereby prejudiced. My review is based on the record and the recommended decision of the ALJ, 29 C.F.R. § 24.6(b)(1), and I have considered Complainant's pro se brief to the extent that it addresses matters in the record. I note that Respondent was given an opportunity to file a brief in support of the ALJ's decision and to reply to the Complainant's brief in opposition. Sec. Order Establishing Briefing Schedule, Aug. 23, 1989; *see* 5 U.S.C. § 557(c) (1988). I find no support for Respondent's claim of prejudice and thus deny the motion to strike.

THE MERITS

Turning to the merits of this case, the record has been carefully reviewed and I agree with the ALJ's conclusions that Complainant failed to establish retaliatory adverse action in violation of the ERA. Generally, in order to establish a prima facie case under employee protection provisions implemented by 29 C.F.R. Part 24, the employee must show that he engaged in protected activity of which the employer was aware and that the employer took some action against him. In addition, a complainant must present evidence sufficient to at least raise an inference that the protected activity was the likely motive for the adverse action. *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec. and Final Order, April 25, 1983, slip op. at 5-9.

Complainant has proffered sufficient evidence to establish a prima facie case that his adverse annual performance appraisal for 1988 was discriminatory. It is undisputed that he engaged in

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protected conduct by writing the letter of complaint to a member of the SMUD Board of Directors on January 9, 1989, and by sending it to the NRC. See Tr. at 233. Complainant also engaged in protected conduct when he filed a grievance with the SMUD general manager on July 5, 1988; wrote a letter to the SMUD general manager on July 21, 1988, alleging safety concerns; and raised concerns through his supervisory chain about his supervisor technical knowledge and violations of the NRC regulations. RX-L; RX-M. None of Complainant's protected conduct occurred before 1988. Consistent with the case law and the Secretary's prior decisions, Complainant's internal complaints and expressed suspicions about violations of the NRC regulations, constitute protected conduct within

the scope of the ERA. *See Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162-1163 (9th Cir. 1984). In addition Respondent was aware of these protected internal complaints at the time of Complainant's performance appraisal. *See* R.D. and O. at 5; Tr. at 98, 131-133, 157-158; RX-L, M, N, O, P. Furthermore, considering that Complainant's unfavorable performance appraisal was signed by his supervisors and dated on February 7 and 8, 1989, shortly after Complainant's January 9 letter, and given to Complainant on April 19, 1989, while Complainant was pursuing an internal grievance procedure, I find there is sufficient evidence to raise an inference that the unfavorable appraisal was in retaliation for protected conduct. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

Once a prima facie case is established, the burden of production shifts to respondent to present evidence that the alleged adverse action was motivated by legitimate, non-discriminatory reasons. If so produced, then complainant, as the party bearing the ultimate burden of persuasion of discrimination, has the opportunity to show that the proffered reason was not the true reason for the decision, but a pretext. *See Dartey*, slip op. at 8-9. The record here establishes that Respondent demonstrated legitimate, nondiscriminatory reasons for Complainant's unfavorable performance appraisal, and that Complainant failed to show they were pretextual.[4] *See* RX-C, D, E, F, G, H, I, J, K. Respondent provided testimony and documentation of the recurring problems and deficiencies with Complainant's work performance beginning in late 1987, *e.g.* failing to complete assignments on time, difficulty completing long-term projects in a professional manner, and communication problems. Tr. at 59-63; 152-156. Additionally, Respondent established that Complainant's supervisor made efforts throughout

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1988 to assist Complainant in remedying these problems. RX-C; Tr. at 112. The record shows that the performance appraisal was consistent with the feedback Complainant received from his supervisor during the appraisal period. Additionally, although the performance appraisal was issued after Complainant's protected activity, Respondent began documenting the underlying work problems in December 1987, before Complainant engaged in any protected conduct.

Complainant has not presented evidence sufficient to establish that Respondent's reasons for the adverse performance appraisal were pretexts for unlawful discrimination. From this record, I conclude that Respondent's concerns over Complainant's work commenced prior to any protected activity. Consequently, although Complainant engaged in protected conduct of which Respondent was aware, Complainant has not established that his adverse performance appraisal for 1988 was in any way motivated by his protected conduct.

Finally, I adopt, and in the interest of convenience append, the ALJ's findings and reasoning regarding Complainant's additional allegations of discrimination as in accordance with the *Dartey* analysis discussed above. *See* ALJ's R.D. and O. at 6-8.[5] I

conclude that Complainant failed to establish discrimination under the ERA, and accordingly, the complaint is dismissed.

SO ORDERED.

Lynn Martin
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]Under the regulations implementing the ERA, administrative law judges issue recommended decisions. 29 C.F.R. § 24.6(a) (1990).

[2]Copies of unsigned drafts of a settlement agreement, dated May 1989, and notes from Complainant stating his objections to the draft agreement, are found in the administrative file in this case record, but apparently were not admitted as evidence in the case. Respondent's counsel stated during the hearing that a settlement was reached concerning the suspension, Tr. at 226-227, and Complainant makes the same assertion in his ERA complaint.

[3]It is well-settled that pro se pleadings cannot be dismissed unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 519, 520 (1972), *quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kamin v. Hunter Corporation*, Case No. 89-ERA-11, Sec. Order to Show Cause, Sept. 12, 1989, slip op. at 4.

[4]Complainant did not show that discriminatory motives played any part in Respondent's adverse performance appraisal, consequently, the dual motive analysis is not applicable. *See Pogue v. United States Department of Labor*, 940 F.2d 1287, 1289-91 (9th Cir. 1991). In reaching this conclusion, I have accepted the ALJ's credibility determinations on Respondent's proffered testimony concerning the legitimate reasons for the performance appraisal and for other actions challenged by Complainant at the hearing, such as denial of vacation time. *See* ALJ's R. D. and O. at 5-8; *Pogue*, 940 F.2d at 1290.

[5]The ALJ considered all the potential claims raised by this *pro se* Complainant, although not all of the allegations were specified in the complaint. The Secretary has held generally that complaints filed under the employee protection statutes and the applicable regulations are not formal pleadings. *See Sawyers v. Baldwin Union Free School District*, Case No. 85-TSC-1, Sec. Dec. and order of Remand, October 5, 1988, slip op. at 2-4; *Bassett v. Niagara Mohawk Power Co.*, Case No. 86-ERA-2, Sec. Order of Remand, July 9, 1986, slip op. at 5; *Richter v. Baldwin Associates*, Case No. 84-ERA-9, Sec. Dec., March 12, 1986, slip op. at 9